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Supreme Court, U.S.
FILED
95-796 NOV 20 1995
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

THOMAS CLINTON MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE RULE APPLIED BY THE FIFTH CIRCUIT, AND THE FIFTH CIRCUIT ALONE, THAT REQUIRES A PETITIONER TO PRODUCE AN EYEWITNESS TO AN UNKEPT PROMISE IN ORDER TO OBTAIN A HEARING ON THE CLAIM THAT THE PETITIONER PLEADED GUILTY INVOLUNTARILY BASED ON THE PROMISE, IS CONSTITUTIONAL AND PERMISSIBLE UNDER THE EXPLICIT LANGUAGE OF 28 U.S.C. § 2255 AND THE LAW OF THIS COURT.

LIST OF INTERESTED PARTIES

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Counsel for Petitioner Thomas Clinton Martin (hereafter Mr. Martin) originally appealed Mr. Martin's sentence by way of a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967) which the Fifth Circuit Court of Appeals rejected and ordered counsel to brief whether a "guilty plea should be disturbed because of the district court's failure to mention supervised release . . . " *See* June 18, 1993, Order, attached hereto as Appendix (App.) 20-21. The Fifth Circuit Court of Appeals subsequently denied Mr. Martin's direct appeal in an unpublished opinion, dated January 5, 1994, which is attached hereto as App. 17-19.

The order of the United States District Court for the Southern District of Texas, Houston Division, denying Mr. Martin's motion to vacate, set aside or correct sentence was filed on November 2, 1994 and is not published. It is attached hereto as App. 7-16.

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the lower court's dismissal of Mr. Martin's motion to vacate, set aside or correct sentence was issued on August 21, 1995 and is not published. It is attached hereto as App. 1-6.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit, filed August 21, 1995, under 28 U.S.C. § 1254(i) (1993) and Supreme Court Rule 10.1(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provision of 28 U.S.C. § 2255 which mandates when a court must have a hearing on a prisoner's motion to vacate, set aside or correct a sentence:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing, thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

This case also involves the due process clause of the Fifth Amendment to the United States Constitution, which states that no person shall "be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Procedural History

A federal grand jury returned Indictment No. H-92-0090 (hereafter Indictment) against Mr. Martin on April 3, 1992, charging him with one count of being a convicted felon in possession of 36 firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), one count of knowingly using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D), and one count of possessing two guns defined in 26 U.S.C. § 5845(a), in violation of 26 U.S.C. § 5861(d). The district court, the

Honorable Judge David Hittner residing, had "original jurisdiction" over "all offenses against the laws of the United States" under 18 U.S.C. § 3231. On November 23, 1992, Mr. Martin pleaded guilty to Counts I and II of the Indictment. District Court Judge David Hittner accepted Mr. Martin's guilty plea and on January 22, 1993, sentenced Mr. Martin to a term of 97 months on Count I and 60 months on Count II, to run consecutive to the 97 months, for a total sentence of 157 months.

On September 28, 1994, Mr. Martin filed a pro se Motion pursuant to 28 U.S.C. § 2255 with the district court, requesting the court to vacate or set aside his conviction, and claiming that his counsel's ineffective assistance had rendered his plea involuntary and unintelligent and had caused him to receive an unconstitutionally long sentence. On October 31, 1994, without holding an evidentiary hearing, the district court entered a Final Judgment summarily denying Mr. Martin's § 2255 Motion without a hearing. Mr. Martin timely appealed the order of the district court. Mr. Martin hired counsel on appeal, the issues were briefed, and on August 21, 1995, the Fifth Circuit denied his appeal without a hearing.

B. Statement of Facts

Mr. Martin is 66 years of age, in poor physical condition, and is currently serving a sentence of 157 months incarceration despite his lawyer's promise that upon entering a guilty plea, he would receive a light sentence. The indictment stems from an October 2, 1990 reverse sting operation in which state police officers sold Mr.

Martin marijuana, and arrested Mr. Martin outside his residence. Without obtaining a search warrant, the officers then searched Mr. Martin's residence and confiscated various items of personal property. Several hours later, federal agents from Alcohol, Tobacco and Firearms also searched Mr. Martin's residence without obtaining a search warrant and confiscated Mr. Martin's gun collection of 44 firearms.

The events of October 2, 1990 led to Mr. Martin being prosecuted in Texas state court, forfeiture proceedings in federal court which resulted in Mr. Martin losing his residence, and the federal indictment in this case which has resulted in Mr. Martin pleading guilty and being incarcerated for a term of 157 months, a life sentence for a man of his age and health.[1] Mr. Martin pleaded guilty

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[1] The charges in Texas state court were dismissed after Texas State Judge Ted Poe held that the police officers unlawfully seized Mr. Martin's property in violation of the Fourth Amendment and entered an order suppressing the seized property.

On November 14, 1990, the Federal Bureau of Alcohol, Tobacco and Firearms commenced a civil administrative forfeiture proceeding against the guns seized from Mr. Martin on October 2, 1990. The administrative forfeiture proceeding was concluded on January 1, 1991 and the guns were forfeited to the federal government.

On April 28, 1992, the United States District Court for the Southern District of Texas, Houston, Division entered a civil Default Judgment and Decree of Forfeiture, Civ. Act No. H-90 3439 IN, against Mr. Martin's residence. This federal, civil forfeiture proceeding also arose out of the criminal conduct alleged to have occurred October 2, 1990, which formed the basis of the Indictment.

because his trial counsel, Mr. Timothy L. Jackson (hereafter "counsel") failed to explain to Mr. Martin the strength of both his Fourth Amendment claim based on the officers' searching his home without a warrant and his Fifth Amendment claim based on the double jeopardy implications of prosecuting Mr. Martin after his home had been forfeited for the same alleged conduct. Instead, counsel pressured Mr. Martin to enter a guilty plea to Counts I and II of the Indictment by advising him that he was in a "no win" situation, and by threatening Mr. Martin that if he proceeded to trial he would definitely lose and receive a sentence of thirty-five years. Counsel told Mr. Martin that if he pleaded guilty, his adjusted base offense level under the applicable sentencing guidelines would be 16. Counsel promised Mr. Martin an unrealistically lenient sentence on Count I in the range of only 24-30 months. Finally, counsel pressured Mr. Martin to plead by telling him that in order to try his case, Mr. Martin would have to pay counsel an additional $5000, money which counsel knew Mr. Martin did not have. Rather than investigating Mr. Martin's case, developing a defense strategy for him and explaining the possible defenses to Mr. Martin, counsel coerced Mr. Martin to plead guilty with false promises and misinformation.

On July 15, 1992, Judge Hittner held a guilty plea hearing. At that hearing, Judge Hittner conducted an inquiry, as instructed by Fed. R. Crim. P. 11. During that inquiry, counsel claimed he had had adequate time to investigate the law and facts of Mr. Martin's case and that he was satisfied Mr. Martin did not have any meritorious defenses.

The court inquired into the terms of the plea agreement and the government stated that in exchange for a plea of guilty to Counts I and II of the Indictment, the government agreed, pursuant to Rule 11(e)(1)(B), to dismiss Count III of the Indictment, to stipulate to acceptance of responsibility and to remain silent on the issue of whether two of Mr. Martin's three prior felony convictions should be considered as separate offenses for § 924(e)(1) enhancement purposes. In response to questioning by the court, Mr. Martin stated that no other promises had been made to him.

Following the government's recitation of the factual basis for the guilty plea, Mr. Martin said he could not agree with the government's claim that at the time of the offense he was carrying a Colt semiautomatic pistol. Mr. Martin explained that in fact he had been carrying a BB gun. The court admonished counsel that Mr. Martin would have to accept the government's version of the facts. Then, claiming he did not mean for either side to pressure Mr. Martin, the court recessed the hearing until counsel could confer with Mr. Martin. After counsel conferred with Mr. Martin in private and off the record, counsel advised the court that Mr. Martin would agree to the facts as stated by the government. The court then asked Mr. Martin if he agreed with the facts as recited by the government and he responded, "yes, sir." The court then accepted Mr. Martin's plea of guilty.

The district court sentenced Mr. Martin on September 24, 1992. Counsel did not prepare a written sentencing memorandum, offer any remarks on Mr. Martin's behalf,

or argue for a downward departure and a lenient sentence. The district court appeared surprised when counsel informed him that he did not intend to make a statement on Mr. Martin's behalf. Counsel advised the district court that, instead, Mr. Martin had submitted a letter. The district court corrected counsel and pointed out that Mr. Martin had filed a *pro se* motion to dismiss the indictment. Mr. Martin's *pro se* motion appeared to upset the district court and counsel as well as the government. Counsel advised the district court that he intended to withdraw from his representation as soon as the case was over. The district court struck Mr. Martin's dismissal motion as improperly filed with instructions to Mr. Martin that he could file it again either *pro se* or with subsequent counsel.

In violation of its agreement to remain silent on Mr. Martin's three prior convictions, the government stated "government's position is that this defendant has three convictions." The government then described in detail Mr. Martin's prior felony convictions and recommended an upward departure of Mr. Martin's base offense level from level 24 to level 26. Counsel did not object or make any comment on the government's violation of its promise or its request for upward departure.

At the beginning of the sentencing hearing, both the government and the probation department agreed that Mr. Martin's total offense level was 24 and that the appropriate guideline range was 51 to 63 months for Count I. Ignoring the position of both the probation department and the government as to the appropriate offense level, the district court proceeded to depart upward five levels from Mr. Martin's base offense level of 26 to 31. The

district court claimed that this was a reasonable sanction for Mr. Martin's possession of 36 firearms. Far from submitting a memorandum in opposition to such an upward departure in advance of sentencing, counsel did not object, or even comment upon the upward departure at the sentencing hearing. The court then found that Mr. Martin's total offense level was 31, granted Mr. Martin a two level reduction for acceptance of responsibility and found that his total offense level was 29. Counsel remained silent. The guideline range for level 29 was 97 to 121 months. The court imposed a sentence of 97 months for Count I, and 60 months on Count II, to run consecutive to the 97 months, for a total sentence of 157 months. Immediately thereafter, the court granted counsel's motion to withdraw.

On September 28, 1994, Mr. Martin filed a *pro se* Motion and Memorandum to Vacate or Set Aside Conviction Pursuant to 28 U.S.C. § 2255 (hereafter § 2255 motion). Although the claims and arguments in Mr. Martin's *pro se* Memorandum are in places difficult to interpret, he clearly claims that, he received ineffective assistance of counsel in that counsel (1) made a false promise to Mr. Martin that if he pleaded guilty he would receive a light sentence on Count I, in the 24 to 30 month range, (2) pressured him into pleading guilty through threats that he would not represent Mr. Martin at trial without an additional $5,000, and statements that Mr. Martin was in a "no-win" situation and would lose at trial and receive a thirty-five year sentence, (3) failed to pursue his constitutional defenses pursuant to the Fourth Amendment and the Double Jeopardy Clause of the Fifth Amendment and (4) failed to effectively represent him at

sentencing. Mr. Martin requested an evidentiary hearing for the purpose of proving his claims.

The government responded to Mr. Martin's § 2255 Motion on October 21, 1994 and requested that the court deny the Motion. The government did not deny Mr. Martin's many claims of ineffective assistance of counsel but claimed Mr. Martin failed to demonstrate prejudice. On October 31, 1994, the district court rejected all of Mr. Martin's claims without granting him an evidentiary hearing to establish the facts.

Mr. Martin timely appealed the Order denying his § 2255 Motion without an evidentiary hearing. The Fifth Circuit Court of Appeals upheld the decision of the district court, applying well established case law of the Fifth Circuit that in order to prevail on his claim that his plea was involuntary because it was based on counsel's promise that he would receive a light sentence, "[Mr.] Martin must prove: 1) the terms of the alleged promise; 2) where, when and by whom the promise was made; and 3) the identity of an eyewitness to the promise." App. at 4. Because Mr. Martin had not pleaded facts which, if proved, would satisfy this three part test, the Fifth Circuit upheld the district court's summary dismissal of Mr. Martin's petition. It is in order to correct this decision of the Fifth Circuit that Mr. Martin requests this Court to grant his writ for certiorari.

REASON THE COURT SHOULD GRANT THIS WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO CORRECT THE UNCONSTITUTIONAL LAW IN THE FIFTH CIRCUIT THAT REQUIRES A HABEAS PETITIONER TO PRODUCE AN EYEWITNESS TO AN UNKEPT PROMISE WHICH HAS INDUCED AN INVOLUNTARY GUILTY PLEA BEFORE RECEIVING AN EVIDENTIARY HEARING ON THE CLAIM.

"It is elementary that a coerced [and therefore involuntary] plea is open to collateral attack." *Fontaine v. United States*, 411 U.S. 213, 215 (1973); *see also Blackledge v. Allison*, 431 U.S. 63, 72 (1977). Ineffective assistance of counsel can render a plea involuntary. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). In order to prevail on an ineffective assistance of counsel claim in the context of a guilty plea, the petitioner must show that counsel's deficient performance prejudiced his defense to the extent that there is a reasonable probability that, but for the attorney's error, he would not have pleaded guilty. *Hill v. Lockhart*, 474 U.S. 52, 60 (1985). Indeed, when a defendant is not fully apprised of the consequences of his plea, he can bring a challenge under the due process clause. *Mabry v. Johnson*, 467 U.S. 504, 509 (1984). "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." *Machibroda v. United States*, 368 U.S. 487, 493 (1962). Moreover, the fact that a judge conducts an inquiry pursuant to Fed. R. Crim. P. 11 does not preclude a petitioner from collaterally attacking his guilty plea on the grounds that he gave it involuntarily. *Fontaine v. United States*, 411 U.S. at 215 (1973).

Mr. Martin has challenged the voluntariness of his guilty plea, claiming that his trial counsel was ineffective since he coerced Mr. Martin to plead guilty by falsely promising him a lenient sentence. At a hearing, Mr. Martin would show that but for counsel's false promise, Mr. Martin would not have entered a guilty plea. Had the Fifth Circuit Court of Appeals applied the law of this Court, Mr. Martin would have been eligible for an evidentiary hearing on his claim. Instead, the Fifth Circuit applied its own unique and unconstitutional law to Mr. Martin's case and denied Mr. Martin his due process right to a hearing on his § 2255 motion.

A. Through a long line of cases, this Court has established that a judge shall determine whether a guilty plea is involuntary by looking to the specific allegations in the petition and, if necessary, by way of an evidentiary hearing, without any *per se* requirements in the pleadings.

28 U.S.C. § 2255 "requires a district court to 'grant a prompt hearing' when such a motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ' " *Machibroda v. United States*, 368 U.S. 487, 494 (1962) (citing 28 U.S.C. § 2255). Over the years and on numerous occasions, this Court has held that when a prisoner files a motion under 28 U.S.C. § 2255 and raises disputed factual issues which would entitle him to relief if true, the court must hold an

evidentiary hearing to determine the veracity of the prisoner's allegations. *See Walker v. Johnston*, 312 U.S. 275 (1941); *Waley v. Johnston*, 316 U.S. 101 (1942); *Machibroda v. United States*, 368 U.S. 487 (1962); *Fontaine v. United States*, 411 U.S. 213 (1973); *Blackledge v. Allison*, 431 U.S. 63 (1977). Never has the Supreme Court suggested that the prisoner must have, as a threshold requirement, an eyewitness to support his claim of an unkept promise inducing him to plead guilty. Indeed, such a requirement flies in the face of Supreme Court precedent.

In *Machibroda v. United States*, 368 U.S. 487 (1962), this Court specifically rejected the government's position "that a hearing [on a § 2255 motion alleging that a plea was involuntary based on a false promise made by the District Attorney] would be futile because of the apparent lack of any eyewitnesses to the occurrences alleged, other than the petitioner himself and the Assistant United States attorney." *Machibroda v. United States*, 368 U.S. at 495. Petitioner Machibroda, who had been sentenced to 40 years incarceration, filed a § 2255 motion alleging that his plea had been induced by an Assistant United States Attorney's promises that his sentence would not exceed 20 years, and that the prosecutor had admonished him not to tell his lawyer about the agreement. "[T]he Government's contention that [petitioner's] allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence." *Id.* Instead, the *Machibroda* court held that "the District Court did not proceed in conformity with the provisions of 28 U.S.C. § 2255 when it made findings on controverted issues of fact without notice to the petitioner and without a hearing." 368 U.S. at 494. In ordering the district court to hold

a hearing, the Supreme Court found that the lack of an eyewitness to petitioner's allegations did not define the merits of petitioner's claim and that a hearing was necessary to determine disputed facts which were not apparent from the record.

> This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record would, therefore, cast no real light. Nor were the circumstances of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.
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> . . .
>
> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record, he has a right to be heard."

Machibroda v. United States, 368 U.S. at 494-495 (quoting *Walker v. Johnston*, 312 U.S. at 287).

The *Machibroda* decision was not surprising given the two prior decisions of *Walker v. Johnston*, 312 U.S. 275 (1941) and *Waley v. Johnston*, 316 U.S. 101 (1942). In *Walker*

v. Johnston, 312 U.S. 275 (1941), this Court reversed the Ninth Circuit's decision to disallow the petitioner a hearing in a case in which the petitioner claimed that he had been coerced by the Assistant United States Attorney into accepting a plea of guilty. Notably, for purposes of addressing the Fifth Circuit's ruling in Mr. Martin's case, Waley did not claim that there was a witness to the prosecutor's false promises and coercion. Petitioner sought a hearing on his claim. The Ninth Circuit upheld the district court's denial of the motion solely on the pleadings.

The Supreme Court granted certiorari and held that because the pleadings raised issues of fact, the district court should have heard testimony to resolve those issues, rather than merely relying on pleadings and affidavits. *Walker v. Johnston*, 312 U.S. at 287. The *Walker* Court specifically addressed and prohibited the practice of the Ninth and Tenth Circuits at that time to dispose of applications for habeas corpus on matters of fact solely with ex parte affidavits and without the taking of testimony. The Court found that in order to properly deal with questions of fact, courts must "issue the writ, have the petitioner produced, and hold a hearing at which evidence is received . . . Nothing less will satisfy the command of the statute that the judge shall proceed to determine the facts of the case, by hearing testimony and arguments." *Walker*, 312 U.S. at 285 (citations omitted).

A year later, in *Waley v. Johnston*, 316 U.S. 101 (1942), this Court again addressed the voluntariness of a plea in the context of a petitioner claiming that an FBI agent coerced him into pleading with threats. Like the petitioner in *Walker*, Waley did not have a witness to the

allegedly coercive acts of the FBI agent. The government responded to Waley's petition without directly denying Waley's allegations. This Court again granted certiorari to address the propriety of the district court denying Waley's petition without a hearing. Relying on *Walker* for the premise that when a petitioner makes allegations which, if true, would merit the petitioner relief, a hearing is mandated by 28 U.S.C. § 2255, this Court held that Waley's petition and the government's response created questions of fact which deserved an evidentiary hearing. *Waley v. Johnston*, 316 U.S. at 105.

Although a petitioner "may not ordinarily repudiate his statement to the sentencing judge," *Fontaine v. United States*, 411 U.S. 213, 215 (1973), the fact that a judge conducts an inquiry pursuant to Fed. R. Crim. P. 11 does not preclude a petitioner from collaterally attacking his guilty plea on the grounds that he gave it involuntarily. *Id.* In *Fontaine*, after pleading guilty and being sentenced, the petitioner filed a § 2255 motion alleging that his guilty plea was involuntary since it was the product of fear, coercive police tactics and illness. Without holding an evidentiary hearing, the lower courts denied Fontaine any relief, finding that the Rule 11 inquiry was sufficient to show that he pleaded guilty voluntarily. The *Fontaine* Court reversed the decisions of the lower courts and held that because the record of the plea hearing did not, in view of the allegations made, conclusively show that the prisoner was not entitled to relief, the prisoner should be given an evidentiary hearing. *Id.*

Finally, in *Blackledge v. Allison*, 431 U.S. 63 (1977), this Court upheld the decision of the Fourth Circuit Court of Appeals that the district court should hold a hearing on a

petitioner's § 2255 motion, claiming that he pleaded guilty involuntarily. The Court rejected the notion of a *per se* rule that after a Rule 11 inquiry, no collateral attack on a guilty plea will warrant relief. "[T]he federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea [unlawful]" *Blackledge v. Allison*, 431 U.S. at 75. The Court reiterated the by-then well established test that in order for a petitioner to avoid the summary dismissal of a § 2255 motion, the petitioner must make specific allegations, which, if true, would warrant relief.

What the cases cited above indisputably teach is that if a § 2255 petition is plead sufficiently, with supporting facts, an eyewitness or an affidavit from a third party is specifically not needed to warrant the petitioner relief. In fact, it is at the evidentiary hearing that the facts substantiating the claims rise or fall. In most cases, facts regarding inducement, coercion or unkept promises are not found in the record, but can only be carefully examined by the judge at an evidentiary hearing. Thus, the Fifth Circuit's invention that in order to prevail, specific allegations of an unkept promise must necessarily include an eyewitness to that promise, is in direct contravention to the precedent of this Court.

B. The Fifth Circuit's rigid requirement that every § 2255 motion in which a defendant attacks the voluntariness of a plea due to an unkept promise must be supported by an eyewitness to the promise is in direct contradiction to both the explicit language of 28 U.S.C. § 2255 and long standing Supreme Court law on the subject.

Rather than applying the well established, oft repeated law of the Supreme Court that a petitioner has a right to a hearing on a § 2255 motion if petitioner would be entitled to relief were his allegations true, the Fifth Circuit has crafted its own, stringent, almost inevitably unpassable test to ascertain whether a § 2255 petitioner who claims that his plea was involuntarily given based on an unkept promise will merit a hearing. The Fifth Circuit, and the Fifth Circuit alone, requires that the petitioner "prove (1) exactly what the terms of the alleged promise were; (2) exactly when, where, and by whom such a promise was made, and (3) the precise identity of an *eyewitness* to the promise." *United States v. Smith*, 915 F.2d 959, 963 (5th Cir. 1990); *Harmason v. Smith*, 888 F.2d 1527, 1529 (5th Cir. 1989); *Davis v. Butler*, 825 F.2d 892, 894 (5th Cir. 1987); *Smith v. McCotter*, 786 F.2d 697, 701 (5th Cir. 1986); *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985).[2] Furthermore, in order to receive a hearing on a

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[2] Other circuits apply the proper standard that if a § 2255 petitioner alleges facts which, if true, would entitle him to relief, then the district court must conduct an evidentiary hearing. Of course, if the petitioner's claim is "palpably incredible [or] patently frivolous or false," *Blackledge v. Allison*, 431 U.S. at 76, a hearing is not required. *See Bemis v. United States*, 30 F.3d 220 (1st Cir. 1994); *Zilich v. Reid*, 36 F.2d 317 (3rd Cir. 1994); *Flippins*

claim that a plea was involuntary based on an unkept promise, the Fifth Circuit requires a petitioner to attach to the petition an affidavit from a reliable third person stating specific factual allegations. *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985).

In creating this *per se* rule that a petitioner must have an eyewitness to a false promise in order to warrant relief on a claim of an involuntary plea, the Fifth Circuit has misconstrued the ruling in *Blackledge v. Allison*, 431 U.S. 63 (1973). In *Blackledge*, the petitioner did have an eyewitness to his unkept promise and this Court held that, on those facts, the petitioner was entitled to an evidentiary hearing. Relying on the holding in *Blackledge*, the Fifth Circuit first sets forth the three part test in *Hayes v. Maggio*, 699 F.2d 198 (5th Cir. 1983):

> The law is clear that an unkept plea bargain is a valid basis for the grant of the writ of habeas corpus where the petitioner has proved: 1) exactly what the terms of the alleged promise were; 2) exactly when, where, and by whom such a promise was made; and 3) the precise identity of an eyewitness to the promise.

699 F.2d at 203 (citation omitted). Indeed, the Fifth Circuit is correct in holding that when a petitioner makes such a showing, *Blackledge* requires the district court to hold an evidentiary hearing. However, nowhere does the

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v. United States, 747 F.2d 1089 (6th Cir. 1984); *Richardson v. United States*, 577 F.2d 447 (8th Cir. 1978) *cert. denied*, 442 U.S. 910 (1979); *United States v. Baylock*, 20 F.3d 1458 (9th Cir. 1994); *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994); *Slicker v. Wainwright*, 809 F.2d 768 (11th Cir. 1987); *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir.) *cert. denied*, 113 S. Ct. 322 (1992).

Supreme Court in *Blackledge*, or the Fifth Circuit in *Hayes v. Maggio*, state that an eyewitness is a prerequisite to a hearing. However, in the next Fifth Circuit case dealing with an unkept plea bargain, and in every Fifth Circuit case on the subject thereafter, the Fifth Circuit interprets the ruling in *Hayes* as "summariz[ing] what *must be established* before an unkept plea bargain may constitute a basis for habeas relief." *Self v. Blackburn*, 751 F.2d at 793 (emphasis added). Thus, from *Self* onwards, the Fifth Circuit unconstitutionally implements a *per se* rule that a petitioner must produce an eyewitness as a prerequisite to relief, rather than simply noting that such a circumstance would merit an evidentiary hearing.

Clearly, promises made by an attorney to a client will often be made outside the presence of a third eyewitness. When an attorney and a client are discussing a plea bargain, especially if the attorney is pressuring the client to plead guilty, the presence of a witness is unlikely. Mandating that a petitioner can only prove that an unkept promise was made by requiring the petitioner to produce an eyewitness to the promise establishes a virtually impossible hurdle for a petitioner to surpass. Not only are the Fifth Circuit's stringent requirements almost invariably insurmountable, they directly violate both the mandates of Supreme Court rulings and § 2255 itself. As outlined above, over and over, the Supreme Court has upheld a petitioner's right to a hearing on a habeas petition alleging that the petitioner's plea was involuntary because it was given in reliance on an unkept promise. The Supreme Court does not require an eyewitness to the alleged unkept promise. The Fifth Circuit's rule must

be abandoned since it is unconstitutionally restrictive under the law of this Court.

C. In applying the Fifth Circuit's arbitrary requirement that a petitioner produce an eyewitness to an unkept promise in order to show that his plea was involuntary, the Fifth Circuit precluded Mr. Martin from obtaining a hearing on an otherwise meritorious habeas petition.

If Mr. Martin pleaded guilty because his lawyer promised him that he would receive a sentence of only 24-30 months on count I, when in fact, the judge sentenced him to 97 months on count I, Mr. Martin would be able to withdraw his plea as involuntary due to ineffective assistance of counsel. *See Mabry v. Johnson*, 467 U.S. 504 (1984); *McMann v. Richardson*, 397 U.S. 759 (1970). The government has never denied Mr. Martin's allegation of this false promise by his attorney. Instead, both in motions before the district court and the Fifth Circuit Court of Appeals, the government argued that Mr. Martin had not been prejudiced by the actions of his attorney. Suddenly, with no prompting by the government, the Fifth Circuit dismissed Mr. Martin's claim surrounding the false promise by finding that Mr. Martin had not met the requirements of *Davis v. Butler* and its progeny in the Fifth Circuit (petitioner must produce eyewitness to alleged false promise). The Fifth Circuit dismissed Mr. Martin's claim that he received ineffective assistance of counsel based on this false promise only because Mr. Martin did not fulfill the stringent, illegal requirement of

producing an eyewitness to the false promise. The existence of an eyewitness should not and cannot be determinative of whether Mr. Martin's counsel made him a false promise or whether Mr. Martin's pleaded guilty involuntarily because of the false promise.

Mr. Martin is "entitled to careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts." *Blackledge v. Allison*, 431 U.S. at 82-83. This Court should grant certiorari to correct the Fifth Circuit's outlandish test which has precluded Mr. Martin from obtaining a hearing, and potentially relief, on his § 2255 motion.

CONCLUSION

The *per se* rule applied by the Fifth Circuit in the decision below conflicts with the Supreme Court law established in a line of cases from *Walker v. Johnston*, 312 U.S. 275 (1941), through *Machibroda v. United States*, 368 U.S. 487 (1962), to *Blackledge v. Allison*, 431 U.S. 63 (1977). Moreover, the decision places an insurmountable burden on Mr. Martin, a petitioner in a § 2255 motion who pleaded guilty involuntarily based on an unkept promise by his attorney that he would receive a lenient sentence. In requiring Mr. Martin, and all § 2255 petitioners, to produce an eyewitness to an alleged unkept promise in order to obtain a hearing, and eventually obtain relief, the Fifth Circuit is violating the dictates of both 28 U.S.C. § 2255 and the rulings of this Court. This Court must correct the Fifth Circuit's unconstitutional test for reviewing § 2255 petitions which defies the very purpose and

language of the statute, is violative of a petitioner's due process rights to a hearing, and directly contradicts the law of this Court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20867
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS CLINTON MARTIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(94-CV-333 (CR-H-92-0090))

(Filed Aug. 21, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Thomas Clinton Marshall appeals from the district court's denial of his petition for habeas corpus relief.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Specifically, Martin contends that he was denied effective assistance of counsel and was entitled to an evidentiary hearing on that issue. Because we find that no error was committed by the district court, we affirm.

BACKGROUND

Martin pleaded guilty pursuant to a written, signed plea agreement to being a felon in possession of a firearm and the possession of a firearm during and in relation to a drug-trafficking offense. Martin received a 97-month term of incarceration, a consecutive five-year term of incarceration, two concurrent three-year terms of supervised release, and a $100 special assessment. This court affirmed Martin's conviction and sentence on direct appeal. *United States v. Martin*, No. 92-2761 (5th Cir. Jan. 5, 1994) (unpublished).

Martin subsequently filed the instant § 2255 motion, alleging various constitutional violations. The district court denied Martin's § 2255 motion without an evidentiary hearing and granted summary judgment for the Government.

DISCUSSION

Martin has only briefed on appeal issues relating to his ineffective assistance claim. Arguments must be briefed to be preserved. *See Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Therefore, the issues not briefed are deemed abandoned.

Martin also attempts to recast some of the abandoned issues in the ineffective-assistance context. However,

Martin did not present those specific allegations to the district court as instances of ineffective counsel, and thus they have been raised for the first time on appeal in that posture.[1] This court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (internal quotation omitted). Martin's allegations which have been raised for the first time in this court are not purely legal issues, nor has he shown that manifest injustice will result.

The only allegations properly before this court are Martin's allegations that his trial counsel was ineffective because 1) he falsely assured Martin that he would receive a light sentence if he pleaded guilty; 2) he advised Martin that he was in a "no-win" situation and would receive a 35-year sentence if he went to trial; and 3) he threatened to abandon Martin unless he paid an additional $5,000 in attorneys fees should the case go to trial.

In order to prevail on his ineffective assistance claim, Martin must show that counsel's performance fell below an objective standard of reasonable performance and that he was prejudiced by that deficient performance. *Lockhart v. Fretwell*, ___ U.S. ___, ___, 113 S. Ct. 838, 842 (1993). In

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[1] To conclude, as urged by Martin on appeal, that the substance of the abandoned issues were presented to the district court in the ineffective assistance context would require this court to stretch the principle of liberal construction of *pro se* pleadings beyond recognition. We decline to do so.

the context of a guilty plea, Martin must show that counsel's deficient performance prejudiced his defense to the extent that there is a reasonable probability that, but for the attorney's errors, he would not have pleaded guilty, but would have gone to trial. *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S.Ct. 366, 371 (1985).

Martin first alleges that his counsel promised that he would receive a light sentence if he pled guilty. To prevail, Martin must prove: 1) the terms of the alleged promise; 2) where, when, and by whom the promise was made; and 3) the identity of an eyewitness to the promise. *Davis v. Butler*, 825 F.2d 892, 894 (5th Cir. 1987). Martin has not pleaded facts that would, if proved, satisfy this test. Further, Martin testified at sentencing that no one had made any promises "other or different" than those contained in the plea agreement.[2] A defendant's solemn declarations, made in open court, carry a strong presumption of verity. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629 (1977); *United States v. Young*, 981 F.2d 180, 184 n.5 (5th Cir. 1992), *cert. denied*, 111 S.Ct. 2454 (1993).

Next, Martin's contention that he received erroneous advice from counsel is factually incorrect. The Government had filed a notice of intent to seek sentencing enhancement pursuant to § 924(e) (1), which mandates a minimum term of incarceration of "not less than 15 years." Martin was also facing a possible 10-year term of incarceration regarding his violation of § 922(g) (1), *see* § 924(a)(2), and a possible 10-year term of incarceration

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[2] If no promise exists, there is no improper inducement for a plea. *See Harmason v. Smith*, 888 F.2d 1527, 1529-32 (5th Cir. 1989).

on the charge of possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). *See* 26 U.S.C. § 5871. Martin's counsel properly informed him that he was facing a possible 35-year term of incarceration should the judge choose to run the sentences consecutively.

Finally, although Martin contends that counsel required an additional $5,000 should the case go to trial, such an allegation does not show deficient performance. It is axiomatic that retained counsel can charge a higher fee for matters which are more involved and require trial preparation and presentation. Martin never requested court-appointed counsel in the district court. He admits he did not have additional funds to pay the cost of going to trial. Therefore, his contention that counsel was deficient for requiring more compensation for the additional complexities and involvement of trial is without merit.

Furthermore, at his guilty-plea hearing, Martin specifically stated that he had sufficient time to consult with his attorney and that he was satisfied with his attorney. The plea agreement states "that no threats had been made against [Martin] and that [he was] pleading guilty freely and voluntarily because [he was] guilty." Martin has shown neither deficient performance nor prejudice as the result of counsel's actions.

Martin also contends that the district court erred by denying his § 2255 motion without an evidentiary hearing. Because the district court could fairly resolve his ineffective assistance claims with the record before it, no evidentiary hearing was necessary. *See United States v. Smith*, 915 F.2d 959, 964 (5th Cir. 1990).

Martin's contention that he received ineffective assistance of counsel at sentencing because counsel failed to challenge the district court's upward departure was not raised in his § 2255 motion presented to the district court. The mere allegation that, at sentencing, counsel "did not speak on [his] behalf" is insufficient and thus is not properly before the court. *See Varnado*, 920 F.2d at 321.

Accordingly, the district court's dismissal of Martin's petition for writ of habeas corpus is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. THOMAS CLINTON MARTIN, Defendant/Petitioner.	§ § § § § § §	CIVIL ACTION NO. H-94-3333 CRIMINAL NO. H-92-90

ORDER

(Filed Nov. 2, 1994)

Pending before this Court are the motion to vacate, set aside, or correct sentence (H-94-3333, Document #1, CR-92-90, Document #74) filed by petitioner Thomas Clinton Martin ("Martin") and the Motion for Summary Judgment (CR-92-90, Document #78) filed by the United States of America ("United States"). Having considered the motions, the submissions of the parties, and the applicable law, the Court determines that Martin's motion to correct his sentence should be denied and the United States' Motion for Summary Judgment should be granted.

On July 15, 1992 Martin pled guilty to the offense of felon in possession of 36 firearms, in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2) and possession of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). At sentencing, the Court assessed a 97-month term of imprisonment on count one of the indictment and a five-year consecutive term on count two, to be followed by concurrent three-year terms of supervised release.

Martin now seeks to collaterally attack his sentence pursuant to 28 U.S.C. § 2255. To obtain collateral relief, Martin "must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982). Errors of law which may require reversal on appeal do not necessarily provide a basis for relief under section 2255. *Id.* (citing *United States v. Addonizio*, 442 U.S. 178, 184 (1979)); *United States v. Wilcox*, 640 F.2d 970, 973 (9th Cir. 1981). Rather, section 2255 is reserved for constitutional or jurisdictional errors or errors that could not have been raised on direct appeal and would result in a complete miscarriage of justice. *United States v. Shaid*, 916 F.2d 984, 986-87 (5th Cir. 1990), *cert. denied*, 112 S. Ct. 978 (1992); *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. Unit A 1981).

In order to obtain relief for an error to which no contemporaneous objection was made, the petitioner must show both "cause" excusing procedural default and "actual prejudice" resulting from the error. *Shaid*, 916 F.2d at 987 (citing *Frady*, 456 U.S. at 167-68). Claims of ineffective assistance of counsel, however, are excepted from the cause and prejudice standard and reviewed *de novo*. *Id.*

In support of his motion, Martin asserts that: (1) the search and seizure of the firearms from his residence was illegal; (2) the Fifth Amendment proscription against double jeopardy was violated; (3) his indictment was the result of vindictive prosecution; (4) 18 U.S.C. § 922(g)(1) is unconstitutional; (5) counts one and two of his indictment are unconstitutionally vague and uncertain; (6) he was not properly indicted by the grand jury; (7) the district court incorrectly applied the sentencing guidelines; and (8) Martin's counsel was ineffective.

The Court initially determines that an evidentiary hearing is unnecessary to dispose of the issues raised in the section 2255 motion. *See* Rules Governing Section 2255 Proceedings in the United States District Courts Rule 8(a); *United States v. Smith*, 915 F.2d 959, 964 (5th Cir. 1990); *United States v. Santora*, 711 F.2d 41, 42 (5th Cir. 1983); *United States v. Auten*, 632 F.2d 478, 482-83 (5th Cir. 1980).

Martin first argues that the search and seizure of his house by [sic] violated his Fourth Amendment rights. Specifically, Martin alleges that the search of his home by state officers violated his constitutional rights, that the government failed to show that he consented to the search, and that the evidence seized as a result of the search was inadmissible evidence. Martin entered a plea of guilty to the offenses charged and thus waived any right to complain of alleged constitutional violations that occurred prior to the entry of the guilty plea. *United States v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir. 1991). Martin's knowing and voluntary plea waived all non-jurisdictional defects including his Fourth Amendment challenges to his residence and the evidence seized. In addition, Martin's claims that state agents violated the "knock and announce rule" requirements of 18 U.S.C. § 3109 not only are without merit as this rule does not apply to state actors but also was not raised on direct appeal. Additionally, this claim does not rise to a constitutional violation or jurisdictional defect.

Martin argues that the Fifth Amendment prohibition against double jeopardy was violated in his criminal prosecution. In support, Martin argues that: (1) charging him with possession of a firearm as a convicted felon and

with possession of a firearm during and in relation to a drug trafficking offense constitutes a double jeopardy violation; (2) that the possession of multiple firearms constitutes only one offense while he was charged with multiple offenses for possession of a firearm; (3) that he was charged in state court for the same offenses alleged in count two of the federal indictment; and (4) that the state prosecutor who returned the indictment subsequently transferred to the United States Attorney's office and was the same prosecutor who returned the federal indictment.

None of this [sic] claims alleges a double jeopardy violation. First, the offense of possession of a firearm as a convicted felon and the offense of possession of a firearm during and in relation to a drug trafficking offense each require proof of a fact that the other does not. Thus, indicting a defendant for both of these offenses does not violate the Fifth Amendment. *See Blockburger v. United States*, 284 U.S. 299 (1932). Second, Martin's assertion that he was multiply charged for the single offense of possessing 36 firearms is untrue. Martin pled guilty to the possession of the 36 weapons as a single offense alleged in count one of the indictment. Third, with regard to Martin's claim that he was charged in state court for an offense arising out the same conduct for which he was federally indicted in count 2, the double jeopardy clause of the Fifth Amendment is not implicated when an action is prosecuted by a separate sovereign. *United States v. Rosogie*, 21 F.3d 632, 634 (5th Cir. 1994). Finally, Martin argues that the double jeopardy clause was violated because the federal prosecutor tried him in state court on the same charges. Assuming arguendo that this claim has

any merit, the indictment and the record identify the federal prosecutors in this case as United States Attorney Ronald G. Woods and Assistant United States Attorney Abe Martinez, not Joseph Magliola as Martin alleges.

Martin asserts that the indictment against him was the result of vindictive prosecution. Specifically, Martin argues that the state court had exclusive jurisdiction over the offense because the Harris County Sheriff's office conducted the investigation and it is not a federal crime to use a firearm in connection with a state court offense. Martin also asserts that the Harris County officials referred the case to the Alcohol, Tobacco and Firearm Agency (A.T.F.) in order to obtain a greater sentence for Martin.

Martin's claim that only the state courts had jurisdiction is frivolous. The offenses to which he pled are clearly provided by the federal statutes in the indictment. Martin's claims that the [sic] his case was selectively prosecuted is also without merit. Martin has failed to establish the [sic] a prima facie case of selective prosecution. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

Martin also argues that 18 U.S.C. § 922(g)(1) is unconstitutional. This section states in part, that is it [sic] unlawful for any person convicted of a crime to receive, possess, or transport any firearm or ammunition in interstate commerce. The Fifth Circuit has previously determined the constitutionality of this section. *United States v. Wallace*, 889 F.2d 580, 583 (5th Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990). Thus, this claim has no merit.

Martin also attacks the constitutionality of his indictment as vague and uncertain because count one failed to

identify the firearms by serial number and count two failed to specify which one of the firearms was used during and in relation to the drug trafficking offense and how it was used. Pursuant to *United States v. Prince,* an indictment will be held to be sufficient if by any reasonable construction it can be said to charge an offense. 868 F.2d 1384, (5th Cir.) *cert. denied,* 493 U.S. 932 (1989). In addition, the sufficiency of an indictment is not open to collateral attack after conviction absent exceptional circumstances. *Id.* The indictment in this case was sufficient to put Martin on notice of the charges pending against him and to satisfy the double jeopardy requirements.

Martin also argues that the grand jury process was tainted by the prosecutor who usurped the function of the grand jury. This claim is without merit and Martin has failed in any way to substantiate this claim.

Martin's challenge to this Court's application of the sentencing guidelines does not rise to the constitutional dimension and is not cognizable on collateral attack. *United States v. Vaughn,* 955 F.2d 367, 368 (5th Cir. 1992). His ex post facto claim is factually incorrect. The enhanced sentence in this case was based on an upward departure from application of the sentencing guidelines. The Court specifically stated that "[i]n order to avoid *ex post facto* issues, the 1990 version of the sentencing guidelines were applied." (Sentencing at 9).

Martin finally asserts that he received ineffective assistance of counsel because his attorney failed to object to many of the grounds identified in the habeas corpus petition, failed to present information that would have prevented Martin from pleading guilty, failed to make a

statement on his behalf at sentencing, abandoning him after sentencing, and advised him that he was in an [sic] no-win situation by going to trial. In order to establish that his guilty plea was due to ineffective assistance of counsel, Martin must satisfy a two-part test. He must demonstrate first that his lawyer's performance was deficient and second, that the deficient performance prejudiced the defense. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *United States v. Smith*, 915 F.2d 959, 963 (5th Cir. 1990) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To demonstrate deficiency, the petitioner must show that his lawyer's representation " 'fell below an objective standard of reasonableness.' " *Smith*, 915 F.2d at 963 (quoting *Strickland*). Thus, Martin must overcome the strong presumption that counsel exercised reasonable professional judgment. *Id.*

To demonstrate prejudice, the petitioner must prove that, but for the alleged errors of counsel, he would not have pled guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59. If the petitioner makes an insufficient showing as to either deficient performance or actual prejudice, the court may dispose of the claim without addressing the other part of the test.

Martin's claims that his counsel was ineffective because he abandoned him after sentencing have no merit. The Court granted Martin's attorney's motion to withdraw as his counsel after sentencing. Martin was appointed counsel for his appeal and such an appeal was filed. There is no Sixth Amendment right to counsel on habeas review. Thus, Martin's claims that his attorney abandoned him does not demonstrate any prejudice by

counsel's withdrawal and does not state a constitutional claim.

Martin's claims that his counsel failed to present information that would have prevented him from pleading guilty do not state a constitutional claim. Mere conclusory allegations of ineffective assistance of counsel do not raise cognizable Sixth Amendment claims. *United States v. Schlang*, 691 F.2d 796 (5th Cir. 1982). Allegations that counsel made an erroneous prediction as to leniency are insufficient to invalidate a guilty plea. *United States v. Stumpf*, 827 F.2d 1027, 1030 (5th Cir. 1987). Martin's claim that his attorney advised him that he was in a no-win situation and was facing a 15-year sentence does not demonstrate any omission on the part of his counsel.

Martin's claim that his counsel failed to make a statement on his behalf at the sentencing hearing does not identify with particularity what his counsel should have said or done. The record reflects that Martin's attorney filed written responses in opposition to the United States' notice of intent to seek an enhanced sentence under 18 U.S.C. § 924(e)(1). Counsel also appeared and represented Martin's interests at the sentencing hearing. At that time, the Court afforded Martin and his counsel an opportunity to make a statement on his behalf. Although both declined, Martin's counsel indicated that he would file a written letter instead. In accordance with the written plea agreement, the United States remained silent on the § 924(e) enhancement. The Court avoided any *ex post facto* claim by assessing punishment based on the 1990 version of the sentencing guidelines. The Court's reasons for the upward departure are articulated on the record and are consistent with the guidelines. Thus, Martin has failed to

demonstrate any prejudice at sentencing or to state what additional matters his counsel should have raised at that time.

In addition to the aforementioned factors, Martin also attested in his written plea agreement and at rearraignment that he was satisfied with his attorney and had [sic] that his attorney had rendered effective assistance of counsel. Thus, Martin has no entitlement to relief from his conviction and sentence pursuant to 28 U.S.C. § 2255. Therefore, based on the foregoing, the Court hereby

ORDERS that the motion to vacate set aside, or correct sentence (H-94-3333, Document #1, CR-92-90, Document #74) is DENIED and the motion for summary judgment (CR-92-90, Document #78) is GRANTED.

SIGNED at Houston, Texas, on this the 31 day of October, 1994.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff/Respondent,	§	CIVIL ACTION NO. H-94-3333
v.	§	CRIMINAL NO. H-92-90
THOMAS CLINTON MARTIN,	§	
Defendant/Petitioner.	§	

FINAL JUDGMENT

(Filed Nov. 2, 1994)

As the petitioner's motion to vacate, set aside, or correct sentence (Document #1) has been denied and the United States of America's Motion for Summary Judgment has been granted, the Court hereby

DISMISSES petitioner's section 2255 motion.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 31 day of October, 1994.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2761
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS CLINTON MARTIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-H-92-090

(Filed Jan. 5, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Thomas Clinton Martin contends that the district court erred by failing to mention supervised release and

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

that its failure to address a Fed. R. Crim P. 11 core concern was not harmless error. Finding his argument unpersuasive, we AFFIRM.

Any claim that a district court has failed to comply with Rule 11 is now viewed for harmless error. *United States v. Johnson*, 1 F.3d 296, 301-02 (5th Cir. 1993) (en banc). We engage in a two-step inquiry for all Rule 11 claims: 1) did the district court, in fact, vary from the procedures required by Rule 11; and 2) if so, did the variance affect a substantial right of the defendant. *See id.* at 302. In making this determination, we consider whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty. *Id.* We are free to examine the entire record on appeal, including documentation that itself post-dates the plea hearing (such as the pre-sentence investigation report, objections thereto, and the transcript of the sentencing hearing), but will consider only those temporally relevant matters revealed in the record. *Id.*

The district court failed to mention supervised release as required by Rule 11. However, the temporally relevant matters in the record indicate that Martin signed a written plea agreement which informed him of a possible three-year period of supervised release and the consequences which would ensue if that period was imposed and subsequently revoked. Furthermore, he was informed by the district court that he could possibly receive a 15-year mandatory minimum sentence on Count One and would receive a consecutive five-year sentence on Count Two. Thus, at the time he entered his plea, and after signing a written plea agreement, Martin was aware of the possibility that he could receive at least a 20-year sentence.

Furthermore, *United States v. Bachynsky*, 934 F.2d 1349, 1353 (5th Cir.) (en banc), *cert. denied*, 112 S.Ct. 402 (1991), indicates that any district court error in this case is harmless. Under the *Bachynsky* "worst case" calculation, the total period of elapsed time between Martin's first day in prison and his last would be 97 months on Count One, 60 months on Count Two, 36 months of supervised release, and 24 months upon revocation thereof, for a total of 217 months – a period of time which does not exceed the 240-month statutory maximum explained to him by the district court. *See United States v. Hekimain*, 975 F.2d 1098, 1102-03 (5th Cir. 1992); 18 U.S.C. §§ 3559 (a)(3), 3583(e)(3).

Based on the written plea agreement which Martin signed prior to entering his guilty plea and the district court's admonition as to the possibility of at least a 20-year term of incarceration, and an application of a *Bachynsky* "worst case" analysis, the district court's improper variance from the mandate of Rule 11 constitutes harmless error only.

Additionally, the Government's motion to redesignate Martin's *pro se* brief is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2761
USDC No. CR-H-92-090

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS CLINTON MARTIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jun. 18, 1993)

ORDER:

The appeal of Thomas Clinton Martin, in which court-appointed counsel R. Christopher Goldsmith has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 993 (1967), raises an issue of arguable merit. Therefore, the motion of counsel to withdraw is DENIED. Martin's attorney is directed to brief whether Martin's guilty plea should be disturbed because of the district court's failure to mention supervised release and its effect during the plea colloquy. *See United States v. Bounds*, 943 F.2d 541, 545 (5th Cir. 1991); *United States v. Johnson*, 983 F.2d 33, 36 (5th Cir.), *petition for en*

banc rehearing granted, 983 F.2d 36 (5th Cir. 1993). Martin's attorney may brief any other appropriate issue.

/s/
UNITED STATES
CIRCUIT JUDGE

(Filed Nov. 9, 1992)

UNITED STATES DISTRICT COURT

SOUTHERN District of **TEXAS**

UNITED STATES OF AMERICA

V.

THOMAS CLINTON MARTIN

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
H-92-00090-01

Timothy Lee Jackson
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1 and 2 on July 15, 1992.

___ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 922(g)(1) and 924(a)(2)	Convicted felon in possession of firearm.	10-02-90	1
18 U.S.C. 924(c)(1)	Possession of a firearm in relation to a drug trafficking offense.	10-02-90	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

X Count(s) 3 (is)(~~are~~) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) 1 and 2 , which shall be due X immediately _ as follows: CLERK, UNITED STATES DISTRICT COURT, Attention: Finance, P.O. Box 61010, Houston, Texas 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 453-20-9886

Defendant's Date of Birth: January 12, 1926

Defendant's Mailing Address:

16319 Bohnhoff Strasse, Apt. B

Houston, Texas 77020

Defendant's Residence Address:

16319 Bohnhoff Strasse, Apt. B

Houston, Texas 77020

September 24, 1992
Date of Imposition of Sentence

/s/ David Hittner
Signature of Judicial Officer

DAVID HITTNER
DISTRICT STATES
DISTRICT JUDGE
Name & Title of Judicial Officer

11/4/92
Date

Defendant: THOMAS CLINTON MARTIN
Case Number: H-92-00090-01

Judgment – Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of NINETY-SEVEN (97) MONTHS as to Count 1; SIXTY (60) MONTHS as to Count 2, to run consecutively to Count 1.

X The court makes the following recommendations to the Bureau of Prisons: None.

X The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ at ___ a.m. p.m. on _____ .

___ as notified by the United Stats marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____ .
___ as notified by the United States marshal.
___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

_____

Defendant: THOMAS CLINTON MARTIN
Case Number: H-92-00090-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to Counts 1 and 2, to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

Defendant: THOMAS CLINTON MARTIN
Case Number: H-92-00090-01

Judgment – Page 4 of 4

STATEMENT OF REASONS

___ The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except (see

attachment, if necessary): Paragraph 113, Correct guideline range is 51-63 months rather than 57-71 months. Paragraph 57 should refer to amphetamine rather than methamphetamine.

Guideline Range Determined by the Court:

Total Offense Level: 24

Criminal History Category: II

Imprisonment Range: 51 to 63 months

Supervised Release Range: 2 to 3 years

Fine Range: $10,000 to $100,000

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $N/A

___ Full restitution is not ordered for the following reason(s):

___ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s).

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

X for the following reason(s): Defendant possessed 36 firearms, one of which was a machine gun and

- the other an 11" barrel shotgun; all not sanctioned by the guidelines. November 1991 guidelines used as it is Congress' intent to sanction these offenses more seriously

APPROVED AS TO FORM: DMO